No. 939 71

In the Supreme Court of the United States

OCTOBER TERM, 1943

ROSCOE A. COFFMAN, PLAINTIFF-APPELLANT

v.

BREEZE CORPORATIONS, INC., AND THE UNITED STATES OF AMERICA

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF NEW JERSEY

MOTION OF THE UNITED STATES TO AFFIRM

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This motion is filed by the United States pursuant to paragraph 3 of Rule 12 of this Court, in response to the Statement of Jurisdiction and other papers filed by the appellant, which urge this Court to review on appeal the judgment entered by the court below.

This action was commenced by appellant Coffman as plaintiff, in the District Court of the United States for the District of New Jersey, to enjoin the defendants-appellees, Federal Laboratories, Inc., a corporation of Delaware, and Breeze Corporations, Inc., a corporation of New Jersey, from paying certain royalties, alleged to be due to Coff-

man, to the Treasurer of the United States in compliance with certain orders issued by the War and Navy Departments (Royalty Adjustment Orders W-9 and N-7, respectively), pursuant to the Act of October 31, 1942 (56 Stat. 1013, 35 U. S. C. Supp. III, 89-96), hereinafter referred to as the Royalty Adjustment Act. Coffman also sought a declaration that this Act was unconstitutional. A specially constituted three-judge court was convened pursuant to the Act of August 24, 1937 (c. 754, § 3, 50 Stat. 752, 28 U. S. C. 380a). On March 4, 1944, on motion of the United States, that court entered a judgment dismissing Coffman's complaint on the ground that there was no justiciable "case or controversy," and that the remedy at law was adequate. Coffman thereupon filed a petition for appeal which was allowed by the court below by order of April 6, 1944.

The United States, as Intervenor below, now submits that this case does not present a "case" or "controversy" entitling plaintiffs to a decision of constitutional questions, and that the judgment below should therefore be affirmed.

STATEMENT OF FACTS

Coffman, the owner of a patent, on December 8, 1932, licensed Federal Laboratories thereunder at a royalty of 6% of the net selling price of all devices and parts covered by the patent. Federal in 1937 and 1939 engaged Breeze Corporations,

a subsidiary, as its exclusive sales agent and distributor to manufacture and sell such devices and parts.

In February 1941, Coffman instituted an action in the District Court of New Jersey against Federal and Breeze, seeking an accounting for royalties allegedly owing to Coffman under the license agreement. Breeze answered, denying liability under the license agreement; Federal was not served with process and did not appear or answer. This action (the "law action") is awaiting trial in the district court.

While the law action was pending, the United States War and Navy Departments gave notice to Coffman, Breeze, and Federal, pursuant to the Royalty Adjustment Act, that the royalties payable to Coffman under the license agreement were unreasonable and excessive. Royalty Adjustment Orders W-9 and N-7 were then issued pursuant to Section 1 of that Act, reducing the royalties to an amount determined to be "fair and just," with a maximum of $50,000 per year, and directed that "the balance * * * of all royalties specified in the licenses * * * which were due to the licensor and were unpaid on the effective date [of the notice] or since said date have or may hereafter become due to licensor on account of any manufacture, use, sale, or other distribution of said inventions for the War Department or Navy Department" shall be paid to the Treasurer of the United States.

Coffman then brought this suit to enjoin Federal and Breeze from complying with these orders, and to obtain a declaration that the Royalty Adjustment Act and the orders issued thereunder were invalid.[1] Federal was again not served and did not appear. Breeze answered, denying liability to either Coffman or the United States; Breeze did not assert any right or defense predicated upon either the Royalty Adjustment Act or the Orders issued thereunder, and did not contravert Coffman's allegations that the Act and orders were unconstitutional.

On January 7, 1944, District Judge Smith issued an order temporarily restraining Breeze and Federal from complying with Royalty Adjustment Orders W–9 and N–7 "until a hearing has been held by a special court of three judges." Circuit Judge McLaughlin and District Judges Smith and Fake were then "designated pursuant to the Act of August 24, 1937, § 3." On January 15, 1944, the United States, upon receipt of a certification under Section 1 of the Act of August 24, 1937, that the constitutionality of an act of Congress affecting the public interest had been drawn in question, intervened with the permission of the specially constituted court below.

[1] Defendants had not then and have not yet, so far as we know, paid Coffman the $50,000 mentioned in the orders, nor the balance to the United States. At the date of the complaint, a meeting of defendants' officers and counsel had been scheduled to consider what action to take.

On February 7, 1944, the United States moved to dismiss the complaint on the ground that the court lacked jurisdiction over the subject matter. On April 6, 1944, after hearing argument and receiving briefs, the court below entered judgment dismissing the complaint, on the grounds (1) that there was no case or controversy as between the immediate parties; and (2) that Coffman had an adequate remedy at law.

I

THE SUIT WAS PROPERLY DISMISSED FOR WANT OF AN ADVERSE INTEREST BETWEEN PLAINTIFF AND DEFENDANTS WITH RESPECT TO THE VALIDITY OF THE STATUTE

The Royalty Adjustment Act (Sec. 1) prohibits payment by the licensee to the licensor of any royalties in excess of those specified in the Order (here $50,000 per year) and provides that the licensor shall have no remedy against the licensee "for the payment of any additional royalty," his sole remedy (except as to royalties fixed in the order) being suit against the United States for any amount needed to make up "fair and just compensation" (Sec. 2).

The present suit seeks to prevent defendants from complying with the orders of Government agencies on the ground that the above statute under which they were issued is unconstitutional. These orders directed defendants to pay no more than a fixed amount of royalties to plaintiff under

their license agreement, and to return the balance to the United States, to the extent that the larger amount had been charged, or was chargeable to the United States. But the defendants have not invoked the Royalty Adjustment Act or the orders issued thereunder as an excuse for not complying with their alleged obligation under the license agreement, have not asserted the validity or invalidity of the Act or orders, and did not offer any resistance or objection to the plaintiff's application for injunctive relief. Indeed, if defendants should prevail on the merits in the pending lawsuit for royalties under the license agreement without relying upon the supervening directions from the Government under the Royalty Adjustment Act, the validity of such directions would be a purely academic matter.

While plaintiff Coffman may benefit from a declaration that the Act is unconstitutional, this is wholly immaterial to defendants, since their royalty costs under the license, whether at the stipulated rate or at the reduced rate specified in the Orders, will be borne by the United States.[2] If the royalties were properly reduced under the Act, royalties up to $50,000 per year will be payable to Coffman, the balance to the United States. If the Act is invalid, all will be payable to Coffman. In neither case would defendants suffer.

[2] Under the Royalty Adjustment Act, only such royalties as are chargeable directly or indirectly to the United States may be reduced. (See Sections 1 and 4.)

In either case, defendants pay only once, and since under their contracts with the United States and with other Government contractors, royalties properly paid are passed on to the United States, defendants are not interested in the amount due under the license agreement. For this reason they have not opposed plaintiff's attack upon the Act or his alleged right to an injunction.

In these circumstances, we submit that there is no adverse interest between plaintiff and defendants as to the validity of the Act, and consequently no "case or controversy" warranting the exercise of judicial power by this Court.

As the court below properly observed:

> The complaint does not invoke the judgment of the Court on the respective rights and liabilities of the parties, but invites only an adjudication on the constitutionality of the Statute and the validity of the Orders; such an adjudication is not essential to the determination of any right or interest asserted by the plaintiff and controverted by the defendant in this action. This defendant, as hereinabove stated, asserts no right or defense predicated upon either the Act or the Orders, and offers no resistance to the application for injunctive relief.

Defendants are under no duress to comply with the orders, since the Act does not subject them to any fines or penalties. Nor have they been faced with suit by the United States in addition to that

heretofore brought at law by the plaintiff. Cf. Federal Interpleader Act, c. 13, 49 Stat. 1096, 28 U. S. C. 41 (26).

In these circumstances it is submitted that the decision below is right in holding that the present suit does not call for an exercise of judicial power in "an adversary proceeding" which touches the "legal relations of parties having adverse legal interests" (*Aetna Life Insurance Co.* v. *Haworth*, 300 U. S. 227, 240–241). The principle has particular application here, since the federal courts will determine constitutional questions "only in the last resort, and as a necessity in the determination of real, earnest, and vital controversy between individuals" (*Chicago and Grand Trunk Ry.* v. *Wellman*, 143 U. S. 339, 345). See also *United States* v. *Johnson*, 319 U. S. 302, 305, and cases there cited.

There is no interest of the plaintiff which requires that this salutary principle be disregarded in the present case. As the court below held, the complaint does not state a cause of action for equitable relief. The plaintiff has not shown that it "has sustained or is immediately in danger of sustaining some direct injury as a result of [the] enforcement" of the statute (*Massachusetts* v. *Mellon*, 262 U. S. 447, 488). Whatever claim the plaintiff may have against the defendants is that of a general creditor. As such the plaintiff has no legal right in the defendants' assets, such as might exist in the case

of a stockholder (cf. *Carter* v. *Carter Coal Co.*, 298 U. S. 238) or lienor (cf. *Z and F. Assets Realization Corp.* v. *Hull*, 311 U. S. 470). There is no good reason why recourse to equity is necessary. As was said in *Arkansas Building Association* v. *Madden*, 175 U. S. 269, 274: "It is quite possible that in cases of this sort the validity of a law may be more conveniently tested, by the party denying it, by a bill in equity than by an action at law; but considerations of that character, while they may explain, do not justify, resort to that mode of proceeding." (Cf. *Moor* v. *Texas & New Orleans R. R. Co.*, 297 U. S. 101.)

II

THE JURISDICTION OF THIS COURT

Plaintiff's application to enjoin the defendants Federal and Breeze from complying with the Royalty Adjustment Orders on the ground that the Royalty Adjustment Act under which they were issued is unconstitutional, was heard and determined by three judges "designated pursuant to the Act of August 24, 1937, c. 754, § 3, 50 Stat. 752, 28 U. S. C. 380a." (See opening recital in opinion below.) Section 3 of the Act of August 24, 1937, provides in part:

> No interlocutory or permanent injunction suspending or restraining the enforcement, operation, or execution of, or setting aside, in whole or in part, any Act of Congress upon the ground that such Act or

> any part thereof is repugnant to the Constitution of the United States shall be issued or granted by any district court of the United States, or by any judge thereof, or by any circuit judge acting as district judge, unless the application for the same * * * shall be heard and determined by three judges, of whom at least one shall be a circuit judge. * * * An appeal may be taken directly to the Supreme Court of the United States upon application therefor or notice thereof within thirty days after the entry of the order, decree, or judgment granting or denying, after notice and hearing, an interlocutory or permanent injunction in such case.

While the conclusion is not free from doubt, we believe that the court of three judges was properly convened. The doubt rests on the fact that no injunction was sought to restrain any agency, officer or employee of the United States from executing, enforcing, or administering an Act of Congress. The suit was solely against a private party. Such a suit would probably not call for a three-judge court under Section 266 of the Judicial Code, the prototype of the section here involved. (Cf. *Oklahoma Gas & Electric Co.* v. *Oklahoma Packing Co.*, 292 U. S. 386.) But Section 266 differs in certain important respects from the present section. See *Jameson & Co.* v. *Morgenthau*, 307 U. S. 171, holding that an attack on the validity of an order, as dis-

tinguished from the validity of a statute, does not require a three-judge court under the Act of August 24, 1937, unlike Section 266 of the Judicial Code. Section 266 speaks in terms of injunctions "restraining the action of any officer of such State." The 1937 Act omits language of that kind. The omission was doubtless significant, since suits effectively restraining the enforcement of federal statutes were commonly brought without joining federal officers. (Cf. *Moor* v. *Texas & N. O. R. R. Co.*, 297 U. S. 101; *California Water Service Co.* v. *City of Redding*, 304 U. S. 252.) In the latter case, brought after the 1937 Act, a three-judge court was held to be improper not because federal officials were not joined but because of the want of a substantial federal question.

Insofar as the present suit is an effort to litigate a constitutional question which should be left to an action at law, the mere fact that in a sense the plaintiff seeks to set aside an Act of Congress does not bring the suit under the 1937 Act (*International Ladies' Garment Workers' Union* v. *Donnelly Garment Co.*, 304 U. S. 243). But to the extent that the present suit seeks a decree restraining the defendants from complying with a statute and orders thereunder on the ground of invalidity of the statute, it would seem to come within the provisions for a three-judge court.

The fact that the decision below dismissing the bill is on a nonconstitutional ground should not

affect the course of appeal to this Court. Cf. *Buck* v. *Gallagher*, 307 U. S. 95, where an appeal was taken directly to this Court under Section 266 from a decision holding that the district court lacked jurisdiction for want of the proper jurisdictional amount in controversy.

CONCLUSION

For the foregoing reasons the United States respectfully submits that the judgment below should be affirmed, and so moves pursuant to Rule 12 (3) of this Court.

CHARLES FAHY,
Charles Fahy,
Solicitor General.

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